IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6540

HAROLD RAMSEY,

Petitioner,

v.

NEW YORK,

Respondent,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

BRIEF FOR THE PETITIONER

STEVEN W. FISHER
BARRY GENE RHODES
RHODES & FISHER
16 Court Street, Suite 1210
Brooklyn, New York 11241
212/624-3784

Counsel to the Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6540

HAROLD RAMSEY,

Petitioner,

v.

NEW YORK,

Respondent,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Supreme Court of the State of New York, Appellate Division, Second Judicial Department, unanimously affirmed the petitioner's conviction without opinion. The affirmance is reported at 61 App. Div. 2d 889, 401 N.Y.S.2d 671 (2nd Dept. 1978). (App. 36.) Chief Judge Charles D. Breitel denied the petitioner's application for leave to appeal to the Court of Appeals of the State of New York. The denial of leave is reported at 44 N.Y.2d 738 ____ N.E.2d ____ , 405 N.Y.S.2d xci (1978). (App. 37.)

JURISDICTION

The order of the Appellate Division was dated February 6, 1978. The certificate denying leave to appeal was dated March 17, 1978. The petition for a writ of certiorari was filed on April 10, 1978. Certiorari was granted on October 10, 1978. The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether a guilty plea is obtained in violation of due process of law when it is induced by a judge's threat to impose upon conviction after trial a sentence which is nearly four times greater than one once proposed to the defendant, and more than twice as great as the sentence the judge then holds out to him as part of a plea offer.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> ...No State shall...deprive any person of life, liberty, or property without due process of law;...

STATEMENT OF THE CASE

HAROLD RAMSEY, the petitioner, stands convicted upon a guilty plea which he contends was the product of unconstitutional judicial coercion. He seeks to have the plea

vacated and to be permitted to stand trial on the underlying charges.

In 1975 the petitioner was named in two Kings County Indictments, each charging him with the crime of robbery in the first degree and lesser included offenses.[1] (App. 2, 38.) The petitioner was a second felony offender, (App. 21.), and as such, he could receive no lesser sentence than an indeterminate term of from 4½ to 9 years incarceration upon conviction for the charged crime; he was subject to as much as a term of from 12½ to 25 years imprisonment. N.Y. Penal Law, *supra*, Sec. 70.06.[2] Were he convicted of first degree robbery under both indictments and given consecutive sentences, the absolute maximum the petitioner faced was an indeterminate term of from 12½ to 30

[1]Section 160.15 of the Penal Law of New York provides in pertinent part: "A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:...3. Uses or threatens the immediate use of a dangerous instrument; or 4. Displays what appears to be a pistol, revolver,...or other firearm. (Consolidated Laws of New York, Book 39, McKinney's 1975).

[2]In New York, a second felony offender faces restrictions on permissible plea bargaining and enhanced sentencing upon conviction. Charged with a felony, he may not dispose of his case by pleading guilty to other than a felony charge. N.Y. Crim. Pro. L. Sec. 220.10(5)(d) (Consolidated Laws of New York, Book 11A, McKinney's Supp. 1977). Additionally, upon conviction, the court is required to specify a minimum term equal to one-half of the maximum term imposed. N.Y. Penal Law, *supra*, Sec. 70.06(4).

In contrast, one who is not a second felony offender may receive a specified minimum term only in cases involving serious felonies, and then only when the court feels that the circumstances of the crime and the history and character of the defendant warrant it. In no event, however, may such minimum term exceed one-third of the maximum term imposed. N.Y. Penal Law, *supra*, Sec. 70.00(3)(b).

years imprisonment. *See*, N.Y. Penal Law, *supra* Sec. 70.30(1)(b) & (c).

As the petitioner's case progressed through the courts, several judges at various stages directed that he undergo psychiatric evaluation to determine whether he was fit to proceed.[3] (App. 76, 88, 98.) He was found fit on all but one occasion when he was ordered held for temporary observation. (App. 82-83.)

The several psychiatric reports submitted to the court contained divergent views. Some skepticism was expressed over whether the petitioner's exhibited behavior reflected true illness. (App. 81, 92-93, 95, 102.) Elsewhere, however, the petitioner was described as a young man of "average or dull-normal" intelligence (App. 103.) who suffered from an unspecified psychosis (App. 81.) or personality disorder with a history of drug dependence. (App. 95, 104.) His disturbance was linked to a broken home and to the abusive behavior of an alcoholic father. (App. 94, 103.) It was also suggested that the petitioner might have been "stigmatized and hurt" by his placement as a child at the Willowbrook State School following a mistaken diagnosis of retardation (App. 94.) One examiner, however, flatly concluded that petitioner was a malingerer (App. 92-93.)

On September 8, 1975, the petitioner appeared in the Conference Part of the Supreme Court, Kings County, where he offered to plead guilty to the charge of robbery in the second degree in full satisfaction of both pending indictments (App. 41-42.) His plea was conditioned upon

[3]*See*, N.Y. Crim. Pro. L., *supra* Art. 730 (McKinney's 1971).

the court's promise to impose an indeterminate sentence of from 3½ to 7 years imprisonment. (App. 43.)[4]

On December 19, 1975, the petitioner withdrew his guilty plea, and both indictments were transferred to a Trial Part. There on August 3, 1976, a *Wade* hearing was begun on Indictment No. 2588/1975. (App. 49.)[5] The one witness called, Miss Rebecca Walker, testified that on the evening of December 30, 1974, the petitioner had robbed her and another woman at gunpoint in a beauty salon. (App. 50-51, 67-68.) She claimed to have seen the petitioner twice before in the area (App. 53-56, 60-65.) and she assured the court that she would remember the petitioner's face for the next twenty years. (App. 64.) On cross-examination, she denied that the police had shown her a single photograph of the petitioner, and she further denied having told a defense investigator that that had occurred. (App. 68-73.) The day of testimony ended with defense counsel promising to produce the investigator to whom Miss Walker had made the statement. (App. 73-75.)

The following day, however, no further testimony was taken. Instead the petitioner offered to plead guilty to the charge of robbery in the first degree, to cover both indictments. The plea was given upon the promise of a 6 to 12 year sentence. (App. 5.) The District Attorney stated that the plea was acceptable to him; he had no sentence recommendation and indicated that he would have none. (App. 6.)

In due course, the petitioner said he understood that by pleading guilty he was waiving his right to trial and all

[4]The very minimum sentence the petitioner could have received upon a conviction for robbery in the second degree was an indeterminate term of from 3 to 6 years. N.Y. Penal Law, *supra*, Sec. 70.06(3).

[5]N.Y. Crim. Pro. L., *supra*, 710.20(5) (McKinney's Supp. 1977).

associated rights. (App. 6-7.) In a perfunctory fashion, he agreed that his plea had not been the product of force or threats and was being voluntarily offered. (App. 7.) Then, responding to a series of questions posed by the judge, the petitioner acknowledged that he had taken some $150 at gunpoint from people at a beauty parlor on December 30, 1974. (App. 8-9.) At the judge's suggestion, the District Attorney requested a similar admission addressed to the acts underlying the second indictment. (App. 8.) Again responding to the judge's questions, the petitioner agreed that on January 20, 1975, he had committed a robbery in a store aided by an armed accomplice. The petitioner did not know how much money had been taken. (App. 9.) The guilty plea was accepted, and the case was adjourned for sentence. (App. 10-11.)

The petitioner's dissatisfaction with the plea, and with his treatment at the hands of the judge, was subsequently expressed at his Probation Department interview. As revealed in the report of that interview, later read into the record by the judge, the petitioner insisted he was innocent. (App. 31-32.) He claimed that he had accepted the plea "for purposes of his own convenience," on advise of counsel, and because he was "tired of being in jail." He had decided not to go to trial because the judge had made a "prejudicial" decision at the *Wade* hearing and "was prejudicing the Jury during the time of selection." The petitioner complained that he was unable "to change Judges" and that "he was afraid of being sentenced to the maximum time." Finally, the petitioner felt that the sentence he was to receive was excessive, especially in view of the 2 to 4 year term imposed upon his co-defendant. The petitioner said that a 3½ to 7 year term would be acceptable

and that he was thinking of withdrawing his guilty plea if the judge insisted on following through with the 6 to 12 year sentence. (App. 32.)

The petitioner subsequently submitted a formal motion to withdraw his guilty plea. The motion was supported by the affidavits of the petitioner and defense counsel. (App. 12.) In his affidavit, the petitioner averred that on August 2, 1976, he had received a plea offer carrying a promise of a 3½ to 7 year sentence, and that he had turned it down, insisting he was innocent. He further claimed that after the *Wade* hearing he had been informed by the judge through counsel that he would receive a 12½ to 25 year sentence if convicted after trial. His affidavit continued, "Upon hearing this staggering jail sentence, and being wearied by having already spent so much time in jail, to wit, 1½ years awaiting trial, I jumped at the offer of a lesser jail term, and against my better judgment, pleaded guilty to crimes I did not commit." (App. 14-15.)

Counsel's supporting affidavit also asserted that the petitioner had refused the 3½ to 7 year sentence offer, that he had claimed he was innocent and that he had asked to proceed to trial. Counsel noted further that, "since the inception of my assignment to defend him the [petitioner] has maintained his innocence...." (App. 16.)

On September 17, 1976, the petitioner appeared for sentence. The judge was aware of the motion and indicated that, although it was returnable on a later date, he was prepared to advance it and decide it forthwith. First, however, he found it appropriate to adjudicate the petitioner a second felony offender in preparation for sentence. (App. 18-19.)

Turning then to the motion, the judge suggested that the District Attorney would have no objection to having it heard and decided then and there. Although the District Attorney claimed to have no notice of the motion, he in fact offered no objection to the judge's proposal, and he took no part in what followed. (App. 21.)

The judge began by reading from the transcript of the plea proceeding at which the petitioner had admitted the commission of the crimes. (App. 22-24.) When permitted to speak, however, the petitioner repudiated those admissions. He said:

> The only reason I took that plea on that day is because you harassed my lawyer in front of the Jury, you understand?
>
> You intimidated him.
>
> * * *
>
> I am telling you I am not guilty. The only reason I took my plea is because I was coerced.
>
> You also told my attorney if I have a trial you will give me twelve to twenty-five years, and he told me that.
>
> * * *
>
> You also started making remarks about a mess of people in the beauty parlor and you already had me tried and convicted.
>
> You said that is my line of work.
>
> When my lawyer said to you that he was ready, we came to the courtroom and you asked my attorney, and he said yes, and you said you are going to trial, and my attorney said yes, and you said I guess your client is innocent.

> You are motherfucking right I am innocent. (App. 24-25.)[6]

The petitioner continued:

> I am innocent and the only reason I took the plea is because you are prejudice [sic].
>
> I know I cannot get a fair trial from you, and I definitely don't trust you. It is impossible to get a fair trial in front of you. (App. 26.)

The judge denied the application to withdraw the plea and declined to "belabor the record by retorting to the vile accusations" made against him. He simply denied them as "falsehood[s]." (App. 26.)

It was at this point, finally, that defense counsel entered the discussion, having been asked by the judge if he had "anything further...to say." (App. 27.) As counsel began, the judge immediately interrupted, indicating that he knew what counsel was about to say. The judge recalled that prior to the *Wade* hearing, he had said at a bench conference that he would probably agree to a guilty plea to robbery in the second degree and a sentence of 3½ to 7 years to cover both indictments. The judge indicated that the disposition would have been subject to a reading of the probation report. Counsel, however, reminded the judge that the petitioner had rejected the proposal, claiming that he was innocent, and that the *Wade* hearing had followed. (App. 27.)

---

[6]When it became clear to the petitioner that his request to withdraw the plea would not be seriously considered, he began to resort to profanity and invective directed at the judge. For this misconduct the petitioner was adjudged in contempt of court and was summarily sentenced to serve thirty days in jail prior to the commencement of his sentence on the conviction. (App. 25, 105-106.) In reaction to the petitioner's use of profanity, the judge ordered him gagged, and later directed that he be handcuffed to his chair. (App. 25, 30.)

Counsel then offered his own recollection of what had transpired after the hearing:

> It was a Miss Walker, your Honor, and it was the only one that took the stand, and after that witness, there was some talk about a plea of guilty, and at that time, the plea of guilty was talked about as I came up to the bench, and we discussed it, and your Honor said that you would give six to twelve with the District Attorney's approval.
>
> I came back and said to my client six to twelve, and he said no, and it went back and forth, and finally we arrived at a decision.
>
> * * *
>
> We arived at a six to twelve year sentence, prior to that time the admonition or the statement was made to me that if this guy goes to trial and he is convicted, he is going to get twelve and a half to twenty-five.
>
> Your Honor told me to take that back to my client which at that time I did, Judge. I gave him that warning. (App. 28.)

The judge said:

> Subject of course of me reading the probation report. It is a practice in my court when there is an armed robbery, to give a maximum sentence, unless there are mitigating circumstances. (App. 28.)

Counsel replied:

> Well, I think your Honor in light of everything, that that was the basis of why [the petitioner] took the plea. (App. 28.)

Further discussion established that when the guilty plea was entered, the defense was ready for trial, a jury had been selected, and the judge was "the trial Judge on the case." (App. 28.)

After repeating that the motion to withdraw the plea was denied, the judge read into the record the petitioner's unflattering probation report which included a rendition of his criminal history that had had its beginning when he was a juvenile. (App. 30-31.) Finally, the judge noted:

> The defendant shows no remorse whatsoever. I almost wish I had not promised six to twelve, but nonetheless, I feel that six to twelve is enough time for this man to receive. (App. 33.)

Sentence was imposed, and the petitioner appealed to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department. He argued that his plea had been the product of judicial coercion. The court unanimously affirmed the conviction without opinion (App. 36.), and Chief Judge Charles D. Breitel subsequently denied leave to appeal to the Court of Appeals of the State of New York. (App. 37.)

Certiorari was granted by this Court on October 10, 1978, and the question presented for review involves whether the petitioner's guilty plea was voluntary in view of the judicial conduct which induced it.

SUMMARY OF ARGUMENT

The petitioner contends that his guilty plea was obtained in violation of due process of law because it was coerced by the trial judge's unconstitutional interference in the plea bargaining process.

The practice of plea bargaining has as its central feature the defendant's willingness to surrender simultaneously a number of fundamental constitutional rights, and to forgo

all challenge even to the most egregious defects in his prosecution. Because a guilty plea has such serious and far-reaching consequences, its validity presupposes that it is the product of the defendant's voluntary choice. *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

The process of plea bargaining is, to some extent, inherently coercive and often presents a defendant with a choice between unpleasant alternatives. Nevertheless, the law finds nothing wrong in compelling him to choose, provided that he is not made to face considerations which the government may not constitutionally inject into the decision-making process. *Parker v. North Carolina*, 397 U.S. 790, 802 (Opinion of BRENNAN, J., in which DOUGLAS, J., and MARSHALL, J. joined.). The petitioner contends that the active participation of a trial judge in pre-plea negotiations gives rise to such considerations and therefore must be prohibited.

When a judge participates in plea discussions, his impartiality is necessarily compromised because he naturally concludes that the defendant who expresses an interest in pleading guilty is almost certainly guilty in fact. Further, when a judge proposes a specific disposition, he presumably does so believing it to be fair for all concerned, and will likely view the defendant's rejection of the offer as an effort to hold out for an undeserved benefit.

In themselves, these factors are not inherently coercive. However, when the judge involved in the plea negotiations is also the judge who will preside at the prospective trial, the impact of his participation upon the defendant's choice is substantial. In such circumstances, the defendant must contend with the fear that, should he decide to stand trial, he will now face a judge who believes him to be not only a

guilty man, but one who has rejected a fair disposition of his case. The defendant will know that that judge will both control his sentence in the event of conviction and make the crucial discretionary rulings at trial that might well determine its outcome. *Cf. United States v. Werker*, 535 F.2d 198 (2d Cir. 1976), *cert. denied*, 429 U.S. 926. These considerations needlessly discourage the exercise of the defendant's constitutional right to trial.

Participation by a trial judge in plea bargaining is a practice that has provoked near universal condemnation — either as requiring reversal *per se* (*see, e.g., Commonwealth v. Evans*, 434 Pa. 52, 252 A.2d 689 [1969]) or as simply another coercive factor to be weighed in determining the voluntariness of a given guilty plea, (*see, e.g., Anderson v. State,* 263 Ind. 583, 335 N.E.2d 225 [1975]). Few would suggest that it is an intrinsic component of plea bargaining,[7] or that it serves some salutory purpose that could not be achieved by the limited participation of a judge who was not to preside at trial.

The petitioner submits therefore that, because, at best, participation by a trial judge is a significant factor tending to induce or encourage the waiver of a defendant's constitutional right to plead not guilty, and because such participation is neither inherent in, nor necessary to, the plea bargaining process, any scheme which permits a trial judge to participate in plea negotiations is unconstitutional. *United States v. Jackson*, 390 U.S. 570 (1968). Since the petitioner's guilty plea resulted from discussions in which the trial judge took an active part, the plea must be vacated.

Moreover, even if a trial judge's participation in plea bargaining is not unconstitutional *per se*, the judicial

[7] *See, e.g.*, Fed. R. Crim. Pro. 11(e) prohibiting judicial participation in the negotiation of guilty pleas.

comments at issue here, standing alone, require reversal. They constituted a plain abuse of the judge's awesome sentencing power, and were clearly calculated to overwhelm the reluctant petitioner and to induce him to tender a guilty plea. Hence they were an affront to all notions of due process and invite condemnation no matter what result they actually produced. *Euziere v. United States*, 249 F.2d 293 (10th Cir. 1957). And on this record, it is manifest that they produced the petitioner's guilty plea.

Although he had heard a prosecution witness identify him as the perpetrator of the charged crime, the petitioner nevertheless flatly rejected the plea offer which included the 6 to 12 year sentence. (App. 27-28.) The only event intervening between that rejection and the petitioner's acceptance of the very same offer shortly thereafter was the trial judge's gratuitous threat to impose upon conviction after trial fully twice the sentence held out as part of the plea offer. The guilty plea was therefore demonstrably the direct product of judicial coercion and must be set aside. *United States ex rel. McGrath v. LaVallee*, 319 F.2d 308, 319 (2nd Cir. 1963) (MARSHALL, then Circuit Judge, dissenting).

ARGUMENT

THE PETITIONER'S GUILTY PLEA WAS THE INVOLUNTARY PRODUCT OF UNCONSTITUTIONAL JUDICIAL PARTICIPATION IN THE PLEA BARGAINING PROCESS. AS SUCH, IT WAS OBTAINED IN VIOLATION OF DUE PROCESS OF LAW AND MUST BE SET ASIDE.

Only in the relatively recent past has plea bargaining achieved acceptance as a legitimate component in the administration of criminal justice. (*See, Blackledge v. Allison*, 431 U.S. 63, 76 [1977].) However, well over a decade ago it was commonly estimated that some ninety percent of all criminal convictions resulted from guilty pleas. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966).

A state defendant who chooses to plead guilty not only consents to the impositon of judgment, (*cf. Boykin v. Alabama*, 395 U.S. 238, 242 [1969]), but, in doing so, he waives his fundamental constitutional rights to a jury trial, (*Duncan v. Louisiana*, 391 U.S. 145 [1968]), to confront his accusers, (*Pointer v. Texas*, 380 U.S. 400 [1965]), to present witnesses in his defense, (*Washington v. Texas*, 388 U.S. 14 [1967]), to remain silent, (*Malloy v. Hogan*, 378 U.S. 1 [1964]), and to avoid conviction except upon proof of guilt beyond all reasonable doubt, (*In re Winship*, 397 U.S. 358 [1970]). He also surrenders all opportunity for further challenge even to the most serious antecedent defects in his prosecution. *Tollett v. Henderson*, 411 U.S. 258 (1973).

Central to the validity of so solemn and significant a waiver is its voluntariness. *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *Machibroda v. United States*, 368 U.S. 487, 493 (1962). The petitioner contends that his guilty plea was not voluntary and therefore cannot stand.

A. THE ACTIVE PARTICIPATION OF A TRIAL JUDGE IN PLEA NEGOTIATIONS RENDERS ANY RESULTING GUILTY PLEA INVOLUNTARY AND VOID.

The clear consensus of legal opinion holds that judges should not participate in plea negotiations.[8] The same view

[8] *See, e.g.*, ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY, §3.3(a) (App. Draft 1968) (*But, see*, Approved Draft of the Standing Committee on Association Standards for Criminal Justice [1978] modifying §3.3 to permit a judge to act as "moderator" at a plea conference held at the request of both sides and to advise the parties as to what disposition would be "acceptable to him."); NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS REPORT §3.7 (1973): NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAW, UNIFORM RULES OF CRIMINAL PROCEDURE 441(a) (1974); *cf.* AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §350.3(5) (1975); INFORMAL OPINION OF THE PROFESSIONAL ETHICS COMMITTEE, No. 779, 51 A.B.A.J. 444 (1965); Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 584-585 (1977); Gallagher, *Judicial Participation in Plea Bargaining: A Search for New Standards*, 9 HARV. C.R. & C.L. L. REV. 29 (1974); White, *A Proposal for the Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 452-453 (1971) Comment, *Judicial Supervision Over California Plea Bargaining: Regulating the Trade*, 59 CAL. L. REV. 962, 995 (1971); Note, *Judicial Plea*

(continued)

is not without substantial support in the nation's statutory and case law.[9] The petitioner submits that due process mandates the absolute prohibition of active judicial participation in plea bargaining whenever the judge involved is also the judge who will preside at trial.

The trial judge and the defendant stand on vastly different footing when they engage in negotiations regarding a guilty plea. As Judge Weinfeld wrote in what has become familiar language:

> The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison at once raise a

(footnote continued from preceding page)

Bargaining, 19 STAN. L. REV. 1082, 1090 (1967); Note, *Official Inducements to Plead Guilty: Suggested Morals For a Marketplace*, 32 U. CHI. L. REV. 167, 187 (1964). *But, see, e.g.*, Note, *Restructuring the Plea Bargain*, 82 YALE L. J. 286 (1972); Lambros, *Plea Bargaining and the Sentencing Process*, 53 F.R.D. 509 (1971).

[9] *See, e.g.*, Fed. R. Crim. Pro. 11(e); Pa. R. Crim. Pro. 319(b)(1) (Purdon's 1978); 6 N.M. Stat. Annot. Crim. Pro. Rules, Rule 21(g)(1) (Supp. 1975); *United States v. Werker*, 535 F.2d 198 (2nd Cir. 1976), *cert. denied*, 429 U.S. 926; *Scott v. United States*, 419 F.2d 264, 273 (D.C. Cir. 1969) (dictum); *Brown v. Beto*, 377 F.2d 950 (5th Cir. 1967); *State v. Buckalew*, 561 P.2d 289 (Sup. Ct. Alaska 1977); *State v. Cross*, ____ S.C. ____, 240 S.E.2d 514 (1977): *State v. Gumienny*, ____ Haw. ____, 568 P.2d 1194 (1977); *State v. Svoboda*, 199 Neb. 452, 259 N.W.2d 609 (1977); *Ex parte Schuflin*, 528 S.W.2d 610, 617 (Tex. Cr. App. 1975); *People v. Clark*, 183 Colo. 201, 515 P.2d 1242 (1973); *Rahhal v. State*, 52 Wis. 2d 144, 187 N.W.2d 800 (1971) (dictum); *State v. Wolfe*, 46 Wis. 2d 478, 175 N.W.2d 216 (1970); *Commonwealth v. Evans*, 434 Pa. 52, 252 A.2d 689 (1969); *State v. Byrd*, 203 Kan. 45, 453 P.2d 22 (1969); *State v. Tyler*, 440 S.W.2d 470 (Sup. Ct. Mo. 1969); *People v. Earegood*, 12 Mich. App. 256, 162 N.W.2d 802 (Ct. App. Mich. 1968), *rev'd* 383 Mich. 82, 173 N.W.2d 205 (1970); *State v. Johnson*, 279 Minn. 209, 156 N.W.2d 218 (1968); *Rogers v. State*, 243 Miss. 219, 136 So.2d 331 (1962); *Mismer v. Raines*, 351 P.2d 1018 (Okl. Cr. 1960).

question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. One facing a prison term, whether of longer or shorter duration is easily influenced to accept what appears the more preferable choice. Intentionally or otherwise, and no matter how well motivated the judge may be, the accused is subjected to a subtle but powerful influence. A guilty plea predicated upon a judge's promise of a definite sentence by its very nature does not qualify as a free and voluntary act. The plea is so interlaced with the promise that the one cannot be separated from the other; remove the promise and the basis for the plea falls.

> A judge's prime responsibility is to maintain the integrity of the judicial system; to see that due process of law, equal protection of the laws and the basic safeguards of a fair trial are upheld. The judge stands as the symbol of evenhanded justice, and none can seriously question that if this central figure in the administration of justice promises an accused that upon a plea of guilty a fixed sentence will follow, his commitment has an all-pervasive and compelling influence in inducing the accused to yield his right to trial. A plea entered upon a bargain agreement between a judge and an accused cannot be squared with due process requirements of the Fourteenth Amendment.

United States ex rel. Elksnis v. Gilligan, 256 F. Supp. 244, 254 (S.D.N.Y. 1966) (footnotes omitted). See, also *Parker v. North Carolina*, 397 U.S. 790, 804 (1970) (Opinion of

BRENNAN, J., in which DOUGLAS, J. and MARSHALL, J. joined); *Brown v. Peyton*, 435 F.2d 1352, 1358 (4th Cir. 1970) (Winter, C.J., dissenting), *cert. denied*, 406 U.S. 931; *Scott v. United States*, 419 F.2d 264, 279-280 (D.C. Cir. 1969) (Wright, C.J., concurring); *Worcester v. Commissioner*, 370 F.2d 713, 718 (1st Cir. 1966); *cf. Schaffner v. Greco*, ____ F. Supp. ____ (S.D.N.Y. 1978) (77 Civ. 281; decided 10/20/78) (Lasker, D.J.) slip opn. at 6; *People v. Heddins*, 66 Ill. 2d 404, 362 N.E.2d 1260, 1263 (1977) (Dooley, J., concurring); *Anderson v. State*, 263 Inc. 583, 335 N.E.2d 225, 227 (1975).

When a trial judge enters plea negotiations, the defendant necessarily becomes subject to additional and significant pressure to surrender his right to trial because the potential cost to him of rejecting a plea offer is significantly increased. From the start, the judge's impartiality is compromised because he is bound to conclude that when a defendant expresses an interest in pleading guilty, he almost certainly is guilty in fact. Should the judge then make a plea offer which the defendant rejects, he will likely view the defendant as a guilty man who is unwilling to accept a fair disposition of his case. *Cf. United States v. Werker*, 535 F.2d 198, 201-202 (2nd Cir. 1976), *cert. denied*, 429 U.S. 926. The defendant will necessarily be aware that, because the judge will carry those views into the trial, and because he will not only control the sentence in the event of conviction[10] but will also hold great sway over the jury, a

[10]In a number of states, the jury rather than the judge imposes the sentence in many cases. *See,* Note, *Judicial Plea Bargaining*, 19 STAN. L. REV. 1082, 1084 n. 15 (1967). However, the judge still controls the trial and his impartiality may find its way into his discretionary rulings. Indeed, while a marked disparity in sentencing may be plain on the record, a defendant has far less protection against the subtle influence a judge may exercise over a jury.

rejection of the plea offer may well subject the defendant to a trial not fully free of hostile judicial influence. *United States v. Werker, supra; Brown v. Peyton, supra*, at 1358 (Winter, C.J. dissenting.) The participation by the trial judge in plea negotiations, then, compels the defendant to add to his list of serious concerns the possibility that rejection of a plea offer will result in a trial had before a judge who is unfavorably disposed towards his efforts to secure acquittal. The danger of standing trial before an unfair tribunal is one that no defendant need ever face or fear under our system of law. *Cf. In re Murchison*, 349 U.S. 133, 136 (1955)[11].

The proposed prohibition of participation by trial judges in plea negotiations is supported by this Court's analysis in *United States v. Jackson*, 390 U.S. 570 (1968). The Court there, although not establishing any new test for measuring the voluntariness of a guilty plea, (*see, North Carolina v. Alford*, 400 U.S. 25, 31 [1970]), examined the constitutionality of a statutory scheme which encouraged such pleas as well as jury waivers by exposing to the death penalty only those defendants who demanded a jury trial. The Court struck down the statute, and wrote:

> The inevitable effect of any such provision is, of course to discourage the assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.
>
> * * *
>
> Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights . . . . The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive.
>
> * * *
>
> . . . [The] evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden on the assertion of a constitutional right.

390 U.S. at 581-583. *Cf. Nieves v. United States*, 280 F. Supp. 994 (S.D.N.Y. 1968). The test of *Jackson* then is whether a procedure which chills the exercise of a constitutional right or encourages its waiver is a necessary feature of a constitutionally legitimate process. *See, Chaffin v. Stynchcombe*, 412 U.S. 17, 44-45 (1973) (MARSHALL, J., dissenting).

Judicial participation in plea bargaining is generally viewed in one of two ways: It is seen either as an intolerably coercive factor which, standing alone, requires the setting aside of any guilty plea it produces, (*see, e.g., Commonwealth v. Evans*, 434 Pa. 52, 252 A.2d 689 [1969]; *People v. Earegood*, 12 Mich. App. 256, 162 N.W.2d 802 [Ct. App. Mich. 1968], rev'd, 383 Mich. 82, 173 N.W.2d 205 [1970]), or as simply one coercive factor to be measured along with other relevant circumstances to determine the voluntariness of any given guilty plea, (*see, e.g., Brown v. Peyton*, 435 F.2d 1352 (4th Cir. 1970), *cert. denied*, 406 U.S. 931; *United States ex rel. McGrath v. LaVallee*, 319 F.2d 308, 315 (2nd Cir. 1963) (Friendly, J., concurring and dissenting); *Anderson v. State*, 263 Ind. 583, 335 N.E.2d 225 (1975).

[11]The petitioner below vigorously asserted that the trial judge had responded with a sarcastic remark when told that the petitioner intended to go to trial (App. 25.) He also claimed that the judge was prejudicing the jury during selection. (App. 32.)

It would be difficult to contend seriously that the active participation of a trial judge does not tend to coerce disposition without trial and the surrender of the constitutional right to plead not guilty. And seemingly no one would suggest that judicial participation is a necessary feature of the plea bargaining process. *Cf.* Note, *Judicial Plea Bargaining*, 19 STAN. L. REV. 1082, 1090 (1967).[12]

Hence the participation of the trial judge in plea negotiations needlessly and significantly encourages the defendant to waive his right to stand trial. Without advancing any state interest (*see, Chaffin v. Stynchcombe*, 412 U.S. 17, 46 [1973] [MARSHALL, J., dissenting]), it injects into the defendant's decision-making process the fear that if he does not accept the judicially proffered disposition he will not be afforded a fair trial before an impartial magistrate. Such unconstitutional considerations simply may not burden the defendant's choice. (*See, Parker v. North Carolina*, 397 U.S. 790, 802 (1970) (Opinion of BRENNAN, J., in which DOUGLAS, J. and MARSHALL, J., joined). Although certainly not all guilty pleas entered after negotiations with a trial judge are involuntary, the needless encouragement of waiver, intrinsic to the practice, renders it invalid. *United States v. Jackson, supra; cf.* Note, *Plea Bargaining: The Case for Reform*, 6 U. RICH. L. REV. 325, 330 (1972). In order, then, to insulate defendants from unnecessary additional coercion, in a process that is already inherently coercive,

[12]In the United States District Courts, for example, where judicial participation in plea bargaining is prohibited, (*see*, Fed. R. Crim. Pro. 11[e]), over 85 percent of those convicted in the year ending June 30, 1977, pleaded guilty or nolo contendere. *See, Annual Report of the Director of the Administrative Office of the United States Courts*, 370 (1977).

this Court should prohibit trial judges from participating in plea negotiations. *Gordon v. State*, 577 P.2d 701 (Sup. Ct. Alaska 1978)[13].

Finally, it should be stressed that the petitioner does not contend that due process broadly prohibits all judicial participation in plea bargaining. A defendant becomes subject to unfairly coercive influence only when he knows that the judge with whom he is negotiating will preside at trial if no disposition is reached. It is the fear of a punitive sentence and of a trial conducted under hostile judicial influence that improperly encourages a defendant to plead guilty. *United States v. Werker*, 535 F.2d 198 (2nd cir. 1976), *cert. denied*, 429 U.S. 926; *Brown v. Peyton*, 435 F.2d 1352, 1358 (4th Cir. 1970) (Winter, C.J., dissenting), *cert. denied*, 406 U.S. 931.[14]

[13]Excluding trial judges from plea negotiations would serve important salutary purposes other than diminishing the danger that "the innocent, or those not clearly guilty, or those who insist upon their innocence, will be induced nevertheless to plead guilty." *Parker v. North Carolina, supra*, at 809 (Opinion of BRENNAN, J.) It would promote finality in litigation since fewer defendants could contend that their guilty pleas were coerced by trial judges. *United States v. Werker, supra*, at 205; *cf. Blackledge v. Allison*, 431 U.S. 63, 83-84 (1977) (POWELL, J. concurring); *Sanders v. United States*, 373 U.S. 1, 24-25 (1963) (HARLAN, J., dissenting). Moreover, it would put an end to those unproductive hearings at which the issue raised is whether a judge's remarks influenced a defendant to plead guilty, a factual question often more difficult to resolve than would be the defendant's guilt or innocence on the original charge. *See, People v. Earegood*, 12 Mich. App. 256, 162 N.W.2d 802, 815 (Ct. App. Mich. 1968), *rev'd* 383 Mich. 82, 173 N.W.2d 205 (1970). *See, also, McCarthy v. United States*, 394 U.S. 459, 469 (1969).

[14]Significantly, the petitioner below expressed precisely these fears, both to the Probation Department and to the judge himself. (*See*, App. 25, 26, 32).

In petitioner's view, therefore, due process would not prevent a state from establishing procedures whereby judges who will not preside at trial participate in plea bargaining.[15] With the aid of proper safeguards, the judge who ultimately presides at trial under such a system might well be persuaded to credit more seriously the claim of innocence of the defendant before him if for no other reason than that he has apparently rejected all offers to plead guilty at earlier stages. *Cf.* Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 306 (1972). And those defendants who are truly interested in plea bargaining would be permitted access to a judge and might thereby avoid the necessity of "pleading in the dark." *See*, Note, *Official Inducements to Plead Guilty: Suggested Morals For a Marketplace*, 32 U. CHI. L. REV. 167, 183 (1964); *cf. United States ex rel. Rosa v. Follette*, 395 F.2d 721, 726 (2nd Cir. 1968), *cert. denied*, 393 U.S. 892.

In sum, participation by a trial judge in the negotiation of a guilty plea is a needlessly coercive factor tending to encourage the waiver of the defendant's right to plead not guilty. Because such participation is not an "inevitable attribute" of the legitimate practice of plea bargaining, (*cf. Bordenkircher v. Hayes*, 434 U.S. 357 [1978]), it is constitutionally impermissible. The petitioner's guilty plea

[15]The petitioner's initial guilty plea was entered in a so-called Conference Part established especially for pre-trial plea discussions with the prosecutor and with the judge who does not preside over trials. *See*, New York Court Rules §751.3(1) (Consolidated laws of New York, McKinney's 1977), *See, also*, Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1090 n. 78, McIntyre and Lippman, *Prosecutors and Early Disposition of Felony Cases*, 56 A.B.A.J. 1154, 1157 (1970).

which resulted from negotiations in which the trial judge played an active part, must therefore be set aside.

B. EVEN IF THE PARTICIPATION OF THE TRIAL JUDGE IN NEGOTIATIONS DID NOT RENDER THE GUILTY PLEA INVALID *PER SE*, THE NATURE AND PURPOSE OF HIS REMARKS REQUIRE THAT THE PLEA BE VACATED.

At the conclusion of the *Wade* hearing, the trial judge extended to the petitioner a plea offer carrying a sentence of from 6 to 12 years. Only upon learning that the petitioner had rejected the offer, did the judge see fit to warn him, through counsel, that conviction after trial for the same offense would bring a sentence of from 12½ to 25 years. (App. 28.)

Under these circumstances, it is clear that the judge's remarks constituted an undisguised threat calculated to overwhelm the reluctant petitioner and to induce him to tender a guilty plea. That being so, a right sense of justice demands that the plea be vacated. *See, United States ex rel. Thurmond v. Mancusi*, 275 F. Supp. 508, 515-516 (E.D.N.Y. 1967). *See also, United States v. Anderson*, 468 F.2d 440, 442 (5th Cir. 1972); *Tyler v. Swenson*, 427 F.2d 412, 414 n. 1 (8th Cir. 1970); *Euziere v. United States*, 249 F.2d 293, 294-295 (10th Cir. 1957); *Kelly v. State*, 44 Ala. App. 307, 208 So.2d 217 (1968); *Letters v. Commonwealth*, 346 Mass. 403, 139 N.E.2d 578 (1963).[16]

[16]In *Brady v. United States*, 397 U.S. 742 (1970) this Court called for an examination of all relevant circumstances in determining the voluntariness of a guilty plea. *Id.* at 749-750. However, the Court took

(continued)

It is imperative for this Court to condemn judicial threats of the sort evidenced in this record. "The prestige and influence of a . . . judge, particularly in relation to a defendant under indictment who stands before him for trial, is so enormous that a strong suggestion from the judge amounts to a command and a command that must be obeyed." *United States v. Cariola*, 323 F.2d 180, 188 (3rd Cir. 1963) (Biggs, Ch. J. concurring and dissenting). The only effective method of deterring judicial over-reaching is to vacate any plea it produces. *Cf. United States ex rel. Thurmond v. Mancusi, supra.*

In the case at bar, the judge admittedly attempted to explain his comments by stating that the maximum sentence would have been imposed, if at all, after a reading of the probation report. The judge stated that it was his policy to impose a maximum sentence for an armed robbery unless mitigating factors were present, and presumably he had planned to search the probation report for such factors. The judge's explanation, however, offered after the fact, does not change what must be the result in this case.

(footnote continued from preceding page)

care to note that, "We here make no reference to the situation where the . . . judge . . . deliberately employ[s] [his] . . . sentencing powers to induce a particular defendant to tender a plea of guilty. In Brady's case there is no claim . . . that the trial judge threatened Brady with a harsher sentence if convicted after trial in order to induce him to plead guilty." *Id.* at 751 n. 8. It would appear, then, that *Brady's* "all relevant circumstances" test was not meant to apply where a trial judge, for the purpose of inducing a guilty plea, threatens to impose a harsher sentence upon conviction after trial. In such circumstances, the application of a *per se* reversal rule would in no way conflict with the *Brady* holding. Indeed, this Court has previously given tacit approval to the principle that a judge's threat of the sort the petitioner received below casts serious doubt over the validity of any guilty plea it produces. *See, McMann v. Richardson*, 397 U.S. 759, 774 (1970).

First, a fair reading of the record reveals that the message sent to the petitioner did not include the suggestion that the imposition of the threatened 12½ to 25 year term would depend upon the contents of the probation report. Moreover, leaving aside the question of whether an announced policy of imposing maximum sentences on convictions for armed robbery would be consistent with due process, (*see, Scott v. United States*, 419 F.2d 264, 274 [D.C. Cir. 1969]; *cf. North Carolina v. Pearce*, 395 U.S. 711, 723-724 [1969]; *United States v. Wiley*, 267 F.2d 453 [7th Cir. 1959]), the record belies the assertion that any such policy motivated the judge's comments here.

At the close of the *Wade* hearing, the District Attorney had apparently indicated that he would no longer consent to a guilty plea to a reduced charge (App. 28.)[17] The plea offer extended to the petitioner by the judge, therefore, called for a 6 to 12 year sentence for robbery in the first degree. Hence, the judge was offering to impose a sentence of less than half the maximum for an armed robbery — this in direct contrast to the strict policy he later claimed he followed.

Finally, after reading what he obviously thought of as a very unflattering probation report, (App. 30-33.), the judge observed:

> . . . The [petitioner] shows no remorse whatsoever. I almost wish I had not promised six to twelve, but nonetheless, *I feel that six to twelve is enough time for this man to receive.* (App. 33.) (Emphasis is supplied.)

Hence it is manifestly clear that the 12½ to 25 year sentence was simply a device employed by the judge to

---

[17]In New York, the District Attorney's consent is required whenever a guilty plea is offered unless the plea is to each count of the indictment as charged. (*See*, N.Y. Crim. Pro. L., *supra*, Sec. 220.10[3]-[5] [McKinney's Supp. 1977]).

induce the unwilling petitioner to plead guilty, for it was more than twice the term the judge actually thought appropriate even in view of the petitioner's background and the nature of the crimes charged. A judge may not be permitted to employ his sentencing power in this fashion. *Worcester v. Commissioner*, 370 F.2d 713, 718 (1st Cir. 1966); *People v. Clark*, 183 Colo. 201, 515 P.2d 1242 (1973).

We have recently learned that a prosecutor may induce a defendant to plead guilty by threatening that, if he does not, additional charges to which he would properly be subject will be filed. *Bordenkircher v. Hayes*, 434 U.S. 375, 365 (1978). However, that result follows from the fact that "[p]lea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial" and that in " 'the give-and-take negotiation common in plea bargaining between the prosecution and defense, [both] arguably possess relatively equal bargaining power.' *Parker v. North Carolina*, 397 U.S. 790, 809 (opinion of BRENNAN, J.)" *Id.* at 362-363.

In contrast a trial judge has no constitutionally legitimate reason for wanting a particular defendant to avoid trial, and he most certainly does not occupy a bargaining position even arguably equal with that of the defendant who stands before him for trial. "Our concept of due process must draw a distinct line between, on the one hand, advice from and "bargaining" between defense and prosecuting attorneys and, on the other hand, discussions by judges who are ultimately to determine the length of sentence to be imposed." *United States ex rel. McGrath v. LaVallee*, 319 F.2d 308, 319-320 (2nd Cir. 1963) (MARSHALL, then

Circuit Judge, dissenting). *See, also, Schaffner v. Greco*, ____ F. Supp. ____ (S.D.N.Y. 1978) (77 Civ. 281, decided 10/20/78) (Lasker, D.J.) slip opn. p. vi-vii, n. 16.

When, as here, a trial judge threatens the imposition of a significantly harsher sentence upon conviction after trial in order to induce a guilty plea, he engages in conduct having the sole objective of discouraging the assertion of a constitutional right. His conduct is therefore "patently unconstitutional," (*Chaffin v. Stynchcombe*, 412 U.S. 17, 32-33 n.20 [1973]), and any guilty plea that it produces cannot stand.

Because the petitioner's guilty plea was produced by a blatant and unconstitutional judicial threat, it must be set aside.

C. THE PETITIONER'S GUILTY PLEA WAS INVOLUNTARY AND IS THEREFORE VOID.

Even if this Court finds that neither the participation of the trial judge nor the nature of the particular comments he made requires reversal *per se*, the petitioner's guilty plea must nevertheless be vacated because the record amply demonstrates that it was involuntary.

After having heard a prosecution witness identify him as the perpetrator of the crime, (App. 51-52.), the petitioner nevertheless rejected the plea offer carrying a 6 to 12 year sentence. He changed his mind and decided to accept the very same offer only after the trial judge's warning had been relayed to him. The guilty plea, therefore, was not a calculated and voluntary response to the petitioner's

assessment of the strength of the prosecution's case or the probabilities of his success at trial. *Cf. Brady v. United States*, 397 U.S. 742, 743, 756 (1970). *United States v. Tateo*, 214 F. Supp. 560, 566-567 (S.D.N.Y. 1963). Instead, it represented a surrender to an overpowering judicial threat made against him at a time when he may well have been unsettled by the damaging evidence just adduced and therefore most vulnerable to strong inducement. *United States v. Tateo, supra*, at 565. *See, also, Schaffner v. Greco*, ___ F. Supp. ___ (S.D.N.Y. 1978) (77 Civ. 281 decided 10/20/78) (Lasker, D.J.), slip opn. at 7. Moreover, the judge's threat was the only event intervening between the petitioner's flat rejection of the 6 to 12 year offer and his acceptance of it moments later. *Cf. United States ex rel. McGrath v. LaVallee*, 319 F.2d 308, 319 (2nd Cir. 1963) (MARSHALL, then Circuit Judge, dissenting).

This Court has said that:

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats . . .

Brady v. United States, 397 U.S. 742, 755 (1970) quoting *Shelton v. United States*, 242 F.2d 101, 115 (5th Cir. 1957) (Tuttle, C.J., dissenting), *rev'd en banc* 246 F.2d 571 (5th Cir. 1957) *rev'd on confession of error* 356 U.S. 26 (1958). The petitioner swore that his change of plea had been the direct result of the judge's threat. (App. 14-15.) The person closest to him during the proceedings, his trial counsel, told the court: "I think your Honor in light of everything, that [the warning] was the basis of why the [petitioner] took the plea." (App. 28.) The record fully

supports that view. *Cf. Brown v. Peyton*, 435 F.2d 1352, 1357 (4th Cir. 1970) (Winter, C.J., dissenting), *cert. denied*, 406 U.S. 931. The petitioner's perfunctory statement during the plea allocution that his guilty plea was not involuntary can be given little weight in view of what is now known to have preceded it. *Scott v. United States*, 419 F.2d 264, 274 (D.C. Cir. 1969) (Opinion of Bazelon Ch. J.). *Cf. Haley v. Ohio*, 332 U.S. 596, 601 (1948).

Whenever the voluntariness of a guilty plea is in issue, considerations of a defendant's guilt or innocence are irrelevant. *E.g., United States v. Tateo*, 214 F. Supp. 560, 564 (S.D.N.Y. 1963). "No matter how heinous the offense charged, how overwhelming the proof of guilt may appear, or how hopeless the defense, a defendant's right to continue with his trial may not be violated. His constitutional right to require the Government to proceed to a conclusion of the trial and to establish guilt by independent evidence should not be exercised under the shadow of a penalty — that if he persists in the assertion of his right and is found guilty, he faces, in view of the Trial Court's announced intention, a maximum sentence, and if he pleads guilty, there is the prospect of a substantially reduced term. To impose upon a defendant such alternatives amounts to coercion as a matter of law." (*Id.* at 567, footnotes omitted.) *Cf. Williams v. Florida*, 399 U.S. 78, 111-114 (1970) (Opinion of BLACK, J., in which DOUGLAS, J., joined); *Byrd v. United States*, 377 A.2d 400, 405 (D.C. App. 1977). "In the area of plea bargaining, the lodestar must be the realization that our law solemnly promises each man accused his day in court." *Scott v. United States*, 419 F.2d 264, 277 (D.C. Cir. 1969) (Opinion of Bazelon, Ch. J.).

The petitioner's day in court was denied to him by the blatantly coercive conduct of the trial judge. Because all the relevant circumstances surrounding the guilty plea indicate beyond question that the petitioner surrendered his constitutional right to stand trial only because the trial judge threatened him with a maximum sentence, the guilty plea must be held involuntary and therefore void.

CONCLUSION

The petitioner's guilty plea was the direct product of the coercive and unconstitutional participation by the trial judge in the plea bargaining process. Therefore, the plea was involuntary and must be declared void.

The order of the Appellate Division below should be reversed and the case should be remanded to that court with instructions to vacate the guilty plea and remand the case to Supreme Court, Kings County, for trial.

Respectfully submitted,

STEVEN W. FISHER
BARRY GENE RHODES
RHODES & FISHER
16 Court Street, Suite 1210
Brooklyn, New York 11241
(212) 624-3784
Counsel to the Petitioner